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No. 93-377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

MILHELM ATTEA & BROS., INC., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF RESPONDENTS

The Oneida Indian Nation of New York moves for leave to file the supplemental brief accompanying this motion.

The Oneida Nation filed a brief amicus curiae in support of Respondents, urging that the federal Indian trader statutes, 25 U.S.C. §§ 261 *et seq.*, preempt New York's regulation of cigarette distributors who trade with Indians. At the same time, two other amici, the Solicitor General and the Seneca Nation, also filed briefs in support of Respondents. These two briefs address the federal statutory preemption issue but also address the legal effect upon New York's cigarette wholesaler regulation of certain Indian treaties to which the Seneca Nation is a party. *See* Brief of the Seneca Nation Amicus Curiae, at 18-29; Brief of the

Solicitor General Amicus Curiae, at 21-24. The supplemental brief we seek to file urges that, because this treaty issue was not raised by the parties or addressed by the courts below, it should not now be addressed by the Court.

The New York Court of Appeals invalidated New York's cigarette wholesaler regulations on the ground that they were preempted by the federal Indian trader statutes. The Court of Appeals did not raise, discuss or decide any issue concerning Indian treaties. *See Milhelm Attea & Bros., Inc. v. Dep't of Taxation and Finance*, 81 N.Y.S.2d 510 (N.Y. 1993). The question presented in New York's petition for a writ of certiorari did not mention or address the effect of Indian treaties, and the effect of such treaties was not raised in the text of the petition. *See* Petition for a Writ of Certiorari, August 31, 1993. The only question presented is the facial validity of the regulations at issue, not their application to particular Indian tribes. Consequently, neither the Petitioners nor Respondents have mentioned the treaty issue in their briefs in this Court or in any court below.[1]

In these circumstances, we seek to file a short supplemental brief to identify these circumstances for the Court, as they are important in deciding whether treaty issues can be injected into this case by amici at this point.

There is ample authority that the Court will not consider a legal issue that was not pressed or passed upon in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). The situation here is more aggravated because the parties themselves have never raised the issue. Moreover, the Seneca Nation currently is litigating in New York courts the effect of its particular treaties

[1] The Seneca Nation had mentioned the treaty issue in their amicus brief in the New York Court of Appeals, but the Court of Appeals disregarded the argument. The Seneca Nation also discussed the treaty issue in its opposition to New York's petition for a writ of certiorari, but until the Solicitor General's brief, no other participant in these proceedings has discussed treaty questions.

on New York's collection of taxes from Indians who sell cigarettes to non-Indians. New York's intermediate appellate court addressed the issue in *Snyder v. Wetzler*, 603 N.Y.S.2d 910 (N.Y. App. 1993), and the case is pending in the New York Court of Appeals pursuant to notice of appeal docketed January 7, 1994.

We note also that the parties most affected by the amici's arguments are not before the Court. There are many Indian tribes in New York and many different Indian treaties. Most of these treaties were not discussed in the briefs of the two amici who seek to raise the Indian treaty issue. Not all tribes are parties to all treaties, and each treaty has its own language and its own historical origin. The Oneida Nation, for example, has treaties with the United States that were not discussed by the amici.[2] Any analysis or decision on treaties necessarily would affect the rights of Indian tribes not before the Court and issues other than the tax issue in this case, all in the absence of a developed record.

In analogous circumstances, the Court has permitted the filing of a supplemental brief by amici. *Goldsboro Christian Schools, Inc. v. United States*, 456 U.S. 922 (1982) (amicus permitted to file supplemental brief addressing issue first raised by Respondent in supplemental memorandum).[3] Filing in this case will not

[2] *Compare* Treaty with the Oneida, Tuscarora and Stockbridge Indians, Dec. 2, 1794, 7 Stat. 47 (Oneida, Tuscarora and Stockbridge only) *with* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15 (treaty with Iroquois member nations); Treaty of Fort Hamar, Jan. 9, 1789, 7 Stat. 33 (same); Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44 (same).

[3] For other cases in which amici have filed supplemental briefs, *see Building & Construction Trades Council v. Associated Builders of Massachusetts/Rhode Island, Inc.*, 113 S.Ct. 651 (1993); *Dixon v. Westinghouse Electric Corp.*, 484 U.S. 910 (1987); *Boyle v. United Technologies Corp.*, 483 U.S. 1043 (1987); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 458 U.S. 1128 (1983); *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970).

prejudice any party, as oral argument is scheduled for March 23, 1994.

Thus, the motion of the amicus curiae, the Oneida Indian Nation of New York, for leave to file the accompanying supplemental brief should be granted.

Respectfully submitted,

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Dated: February 10, 1994

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On Writ of Certiorari to the Court of Appeals of the State of New York

SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF RESPONDENTS

The Oneida Indian Nation of New York, amicus curiae in support of Respondents, filed a brief in this case urging the preemptive force of the Indian trader statutes. Both the Solicitor General and the Seneca Nation of Indians, in their briefs amicus curiae in support of Respondents and in support of preemption under the Indian trader statutes, also address a different issue -- the legal effect of certain Indian treaties to which the Seneca Nation is a party. *See* Brief of the Solicitor General Amicus Curiae at 21-24; Brief of the Seneca Nation Amicus Curiae at 18-29. We respectfully urge the Court not to reach questions concerning Seneca treaties specifically or, more generally, any other Indian treaties.

The treaty issue has not been argued or briefed by Petitioners or Respondents at any stage of this litigation, and consequently has not been discussed in any judicial decision in the record.[1] New York's petition for writ of certiorari does not present the issue. Rather, the question presented by this case is the facial validity of the New York cigarette tax regulations. Question Presented, Petition for Certiorari, at i, August 31, 1993. The validity of the regulations as applied to specific Indian tribes, under specific treaties, is not in issue. That is not surprising because Indian tribes are not parties to this proceeding.

With rare exception, when reviewing state court decisions the Court will not consider arguments that were not both pressed and passed upon in the courts below. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). That rule prevails even when a new argument is made by a party in a state's highest court, but the state court refuses to address it. *See, e.g., Yee*, 112 S. Ct. at 1531. The "pressed and passed upon" rule must have even more force here, where neither party has addressed the treaty argument at any stage.

The Court refuses to consider new issues because "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Illinois v. Gates*, 462 U.S. at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). That is certainly the case here, where only two amici, but neither party, have discussed Indian treaty rights. The treaties raised are not in evidence. There is no historical documentary evidence or expert testimony in the record concerning the circumstances of the making of the treaties. There have been no hearings on the

[1] The issue was discussed in an amicus brief filed by the Seneca Nation of Indians in the New York Court of Appeals, but was not raised by the parties or addressed by the court.

meaning of the treaties, rounds of briefing below, or oral argument on the issue.[2]

Moreover, other parties to the treaties mentioned by the Seneca Nation and the United States have not had a full and fair opportunity to litigate the issue. No Indian nation in New York or member of such a nation is a party to this proceeding. Three of the four treaties discussed by the amici have many more signatories, including the Oneida Nation, in addition to the Senecas and the United States. *See* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty of Fort Hamar, Jan. 9, 1789, 7 Stat. 33; Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44. An interpretation of the treaties without actual litigation and an evidentiary record, without the benefit of participation by the parties most concerned, "may prove ill-considered in other circumstances" and have "untoward practical ramifications." *Illinois v. Gates*, 462 U.S. at 224.

Conversely, there are other treaties with Indian tribes in New York to which the Seneca Nation is not a party, and these treaties have not been identified by the amici. *See, e.g.*, Treaty with the Oneida, Tuscarora and Stockbridge Indians, Dec. 2, 1794, 7 Stat. 47. Thus, a broad question concerning the effect of treaties on the New York regulations at issue in this case would reach the impact of treaties not even before the Court or identified in the record. Further, the impact would reach issues well beyond the particular tax issue presented in this case.

[2] The Seneca Nation currently is litigating in New York courts the effect of its particular treaties on New York's collection of taxes from Indians who sell cigarettes to non-Indians. The intermediate appellate court has addressed the issue. *Snyder v. Wetzler*, 603 N.Y.S.2d 910 (N.Y.App. 1993), and the case now is in the New York Court of Appeals pursuant to notice of appeal docketed January 7, 1994.

CONCLUSION

For these reasons, the Court should not address a treaty issue raised only by amici.

Respectfully submitted,

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